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Supreme Court of the United States

October Term, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,
v.
BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,
v.
DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the Democratic National Committee and the Business Executives' Move for Vietnam Peace, is filed by the American

Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

As the leading reported cases from *United Broadcasting Co.*, 10 F.C.C. 515, through *Retail Store Employees Union* v. *FCC*, 436 F. 2d 248 (C.A.D.C.) indicate, the labor movement has continuously sought, and been continuously denied, the opportunity to utilize broadcast advertising time to reach the public on controversial issues of public importance. It is for this reason that the AFL-CIO wishes to take this opportunity to acquaint this Court with its views on the issues presented in the instant cases.

ARGUMENT

1. "Broadcast licensees . . . serve . . . as 'speakers'. . . in normal programming time" during which they air, *inter alia*, "news and documentary presentations" which they "closely edit and control" (A. 464) and which, therefore, express their considered judgments as broadcast journalists. Licensees also "open up" the airwaves "for direct broadcast presentations by members of the public." A. 475. They sell time to third persons for "advertising purposes"; these advertisements are "nonprogram material" to use Commissioner Cox's suggestive phrase. A. 369. As to this advertising time, broadcasters "serve not . . . as speakers . . . but as administrators of a highly valuable communications resource." A. 464. While licensees are required by the Federal Communications Commission to retain a resid-

ual measure of control over advertisements "to protect the public" from "deceptive or misleading advertisements" (*Center for Law and Social Policy*, 23 P. & F. Radio Regulation 2d 187, 195) it is recognized by all that the purpose of "nonprogram material" is to state the sponsor's views, and that it is not a product of the broadcaster's journalistic judgment. Clearly the decision to cut from a news report to advertisements "for soaps, brassieres, deodorants, and mouthwashes" (A. 250) reflects an economic rather than an editorial choice.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386, this Court disapproved the broadcasters' pretentions "to use their allotted frequencies continuously to broadcast whatever they choose and to exclude whomever they choose from using that frequency." *Red Lion* involved program time as to which "the broadcasters own interests in free speech are very very strong." A. 464-465. The instant case, in contrast, involves only the "allocation of advertising time" as to which "the broadcasters themselves have no substantial First Amendment interest" (A. 465), if indeed they have any at all. Compare *Valentine* v. *Chrestensen*, 316 U.S. 52. Nevertheless, here, once again, a claim of right "to exclude whomever [the broadcasters] choose," in this instance through "a flat ban on paid public issue announcements" (A. 449), is the heart of Petitioners' case. And here, as in *Red Lion*, this claim must be rejected if the purposes of the Communications Act and the promise of the First Amendment are to be fulfilled.

The Government argues that the question presented in the instant case is:

"Whether, under the powers granted to it by the

> Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its 'Fairness Doctrine' requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views." Gov. Br. p. 2.

This misstates the question before the Court unless it is amended as follows:

> "Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its 'Fairness Doctrine' requires broadcast licensees to present programming involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees *who elect to sell time to third persons to advertise goods and services must also* sell *some nonprogram* time to individuals and groups for the advertising of their particular views *on controversial issues of public importance.*" (Our additions in italics).

For the issue here is not whether broadcasters shall be restricted by rules other than the Fairness Doctrine with respect to program time; it is whether they may constitutionally be permitted to discriminate against speech on issues of public importance during advertising time. Thus the Government's artful phrasing of the question poses a false dichotomy between the rights of broadcasters to make their own programming decisions and the rights of non-licensees who wish to broadcast public issue announcements. But the real conflict is between the right of broadcasters to

sell advertising time on any basis that suits their convenience and their obligation to do so in a manner consistent with the values embodied in the First Amendment.

The court below correctly understood this to be the issue. It held that in light of the overall plan of the Communications Act, the Government has a duty to secure broadcaster compliance with the mandate of the Constitution in their handling of advertising time. And, applying First Amendment standards, which none of the Petitioners dispute, the lower court held that the Commission must promulgate rules and regulation which prohibit licensees from discriminating against "editorial" advertisements, which the First Amendment is designed to protect and further (*New York Times* v. *Sullivan*, 376 U.S. 254), in favor of "purely commercial advertisements" which do not come within the protective ambit of that Amendment (*Valentine* v. *Chrestensen*, 316 U.S. 52). In the words of the court below, the "*extreme* form of . . . [licensee] control in . . . the sale of advertising time . . . which totally excludes controversial public debate from [that] time . . . when other sorts of paid announcements are accepted . . . is in violation of the First Amendment" (A. 449, emphasis in the original), and the Commission is, therefore, required to "develop reasonable regulatory guidelines to deal with editorial advertisements" (A. 448). In remanding for further proceedings, the lower court took pains to assure the Commission "broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion." A. 484. The limited and measured steps taken by the court below are the absolute minimum required to harmonize the Communications Act, as elaborated by the Commission's

rulings and regulations, with the requirements of the Constitution. For *New York Times* and *Valentine* v. *Chrestensen* make it plain that to allow the complete subordination of the right to present controversial public issue advertisements to the right to present purely commercial advertisements is to invert the free speech values embodied in the Constitution. And this Court's decision in *Red Lion*, by establishing that it is the "collective right" of the "people as a whole" to have the radio and television media "function consistently with the ends and purposes of the First Amendment" (395 U.S. at 389), has removed all doubt "that the First Amendment . . . has a major role to play . . . [in the regulation of] public broadcasting" (*ibid*).

2. "Free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." *Pickering* v. *Board of Education*, 391 U.S. 563, 573. The right to take part in that debate is accorded to all citizens, not a chosen few. "That Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public. . . . Freedom to publish means freedom for all and not for some." *Associated Press* v. *United States*, 326 U.S. 1, 20. This freedom is a "fundamental personal right . . . of the lonely pamphleteer . . . as much as of the large metropolitan publishers . . . [it] is not confined to newspapers and periodicals." *Branzburg* v. *Hayes*, ... *U.S.* ....., 40 L.W. 5025, 5037. By the same token, within wide limits (see, e.g., *Valentine* v. *Chrestensen*, 316 U.S. 52), the Constitution provides no hierarchy which assigns a higher value to certain forms of free speech than to others. "The constitutional

protection does not turn upon 'the truth, popularity or social utility of the ideas and beliefs which are offered'." *New York Times*, 376 U.S. at 271. "That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons'." *Cohen* v. *California*, 403 U.S. 15, 25. "Our profound national commitment to [these] principle[s]" (*New York Times*, 376 U.S. at 270) rests on the basis that:

> "The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U.S. at 24.

As a general proposition then, it is indisputable that "our people are guaranteed the right to express any thought, free from government censorship, [t]he essence [of which] is content control," and that the Government "may neither select which issues are worth discussing or debating in public facilities" nor practice a policy of "selective exclusions [of speakers] from a public forum . . . justified by reference to content alone." *City of Chicago* v. *Mosley*, ... U.S. ....., 40 L.W. 4877, 4878.

This principle is not absolute, however. "Conflicting demands on the same place may compel the State to make choices among potential users and uses." *Id.* at 4879. Where there are more who wish to express their views than a particular medium can accommodate, governmental rules

of allocation to govern that scarce communications resource are not *per se* violations of the First Amendment even though they still the voices of all but "a tiny fraction of those with the [desire, the] resources, and intelligence to communicate [on that medium] at the same time." *Red Lion,* 395 U.S. at 388. In the face of the "massive reality" of scarcity "it is idle to posit an unabridgeable First Amendment right to [speak]." *Id.* at 388. For, absent government regulation, experience has demonstrated that where the demand to speak has exceeded the supply of opportunities to do so, "the result was chaos" in that "the medium [was] of little use because of the cacophony of competing voices." *Id.* at 376. Where scarcity prevails governmental rules of order are, therefore, the *sine qua non* of "intelligible communication." *Id.* at 388. Thus, such rules are not inherently inconsistent with the First Amendment. For "[i]t would be strange if [that] Amendment, aimed at protecting and furthering communications, prevented the Government from making . . . communication possible." *Id.* at 389. In short, Government action which furthers free speech overall is not subject to censure on the bare ground that it requires some who wish to speak to be quiet:

> "No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules . . . speech has always been dependent on some commitment to order and etiquette . . .:
>
> > 'When self-governing men demand freedom of speech they are not saying that every individual has an inalienable right to speak whenever, wherever, however he chooses. They do not declare than any man may talk as he pleases, when he pleases, about what he pleases, about whom he

> pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right'." Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum,* 1965 Supreme Court Review 1, 23-24.

Naturally Congress has a measure of discretion in tailoring the allocational rules it develops to the needs of a particular medium. The proper function of these rules is to set an agenda for "free and unhindered debate on matters of public importance" (*Pickering,* 391 U.S. at 573), and to meet "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas" (*Red Lion,* 395 U.S. at 390), under circumstances in which "it [is] essential for the Government to tell some applicants that they [can] not [speak] at all because there [is] room for only a few" (*id.* at 388). This requires a most sensitive mediation between competing First Amendment claims in a fashion which fairly promotes coherent discussion covering the full range of human concerns and which avoids the rigidities of "authoritative selection" (*Keyishian* v. *Board of Regents,* 385 U.S. 589, 603). Thus there is no single formula which sets the terms on which the process of selection shall be made, and which applies across the board. "Differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion,* 395 U.S. at 386.

"The Government," to take one example, "could surely have decreed that each frequency should be shared among all . . . those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." *Id.* at 390-391. This would be precisely the "reasonable 'time, place and manner' regulation . . . necessary to further sig-

nificant governmental interests," which this Court has "continually recognized" as valid. *Mosley,* 40 L.W. at 4879. At the same time, it was assuredly open to Congress to decide, as it has, to allot the airwaves to licensees who are required "to conduct themselves as a proxy or fiduciary with obligations to present those views and voices which are representative of their community" (*Red Lion,* 395 U.S. at 389), pursuant to a "twofold duty . . . to give adequate coverage to public issues . . . at the broadcastors own expense [and] initiative [if necessary] . . . [which] coverage must be fair in that it accurately reflects opposing views" (*id.* at 377-378), and who, as the court below recognized, are accorded "broad leeway for professional judgment" in carrying out their responsibilities as broadcast journalists (A. 465). For this option, too, serves the public interest in meaningful debate on public issues complemented by coherent and variegated broadcast programming.

But the fact that there is this range of choice does not mean that the legislative authority is wholly at large. "[J]ustification for selective exclusions from a public forum must be . . . tailored to serve a substantial governmental interest . . . and must be carefully scrutinized." *Mosley,* 40 L.W. at 4879. "The right to use a public place [dedicated to communication] for expressive activity may be restricted only for weighty reasons." *Grayned* v. *City of Rockford,* ..... U.S. ....., 40 L.W. 4881, 4882. In essence, rules of order are compatible with the tenets of free speech because they make "intelligible . . . communication possible." *Red Lion,* 395 U.S. at 388, 389. Thus, in testing the validity of any scheme of allocation the basic touchstone is that the regulatory regime must "enhance rather than

abridge the freedom of speech . . . protected by the First Amendment." *Id.* at 375. The course charted by the court below meets this fundamental requirement; the opposite tack taken by the Commission does not.

The lower court's decision increases the amount of "speech concerning public affairs [which] is more than self-expression; it is the essence of self-government" (*Garrison* v. *Louisiana*, 379 U.S. 64, 74-75) derived from "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press*, 326 U.S. at 20). Thus it enhances "free and unhindered debate on matters of public importance" (*Pickering*, 391 U.S. at 573), as well as "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas." (*Red Lion*, 395 U.S. at 390). It does so by vindicating "the fundamental personal right" (*Branzburg*, 40 L.W. at 5037) of free expression of non-licensees "who wish to exercise their freedom of speech though they are not members of the press" (*New York Times*, 376 U.S. at 266). This serves to maximize the extent to which "the decision as to what views shall be voiced [is placed] in the hands of each of us" (*Cohen* v. *California*, 403 U.S. at 24), and to diminish licensee power to "monopolize a radio frequency to the exclusion of his fellow citizens" (*Red Lion*, 395 U.S. at 389).

These results, which are, of course, consonant with "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee" (*Red Lion*, 395 U.S. at 390), are accomplished

without trenching upon any interest of equal stature. For the court below dealt only with the "permissibility of discrimination . . . against 'controversial' speech and in favor of commercial and 'non-controversial' speech . . . within a given block of advertising time . . . that already has been opened up by the licensees themselves for direct broadcast presentations by members of the public." A. 475. It left undisturbed "the licensees basic right to exercise judgment and control in public issue programming" as to which "the broadcasters own interests in free speech are very, very strong" A. 464-465. Thus, the rights subordinated to the interest in expanding the "marketplace of ideas" on the mass media are the right of the broadcaster to sell, and the right of commercial advertisers to buy, advertising time free of government control. But those rights are not within the ambit of protection afforded by the Constitution. *Valentine* v. *Chrestenson*, 316 U.S. 52.

In contrast the Commission's position does "abridge" rather than "enhance" free speech. It limits speech on controversial public issues in the interest of those who wish to broadcast purely commercial messages. This inverts the balance struck by the Constitution. Compare *New York Times*, 376 U.S. at 266, with *Valentine* v. *Chrestenson*, 316 U.S. 52. It is thus outside the range of options open to the Government in promulgating rules of order. For, a "justification for selective exclusions from a public forum must be . . . tailored to serve a substantial government interest." *Mosley*, 40 L.W. at 4879. *New York Times* and *Valentine* v. *Chrestenson* establish that an interest in furthering commercial advertising at the expense of editorial advertising is not a "subordinating interest which is compelling" (*Bates* v. *Little Rock*, 361 U.S. 516, 524). Thus "a flat ban

on paid public issue announcements" (A. 449) in advertising time open to commercial announcements is plainly an impermissible "selective exclusion [of speakers] from a public forum . . . justified by reference to content alone." *Mosley*, 40 L.W. at 4878. And, of course, this misapprehension of what the First Amendment is all about compounds the already substantial difficulties inherent in assuring that the scarce communications resource of the airwaves is utilized in a manner which "give[s] suitable time and attention to matters of great public concern" (*Red Lion*, 395 U.S. at 394). For, depending on the time presently allotted to commercial advertisements, it provides 40 or 50, rather than 60, minute hours for the presentation of the variegated First Amendment speech which the "public" has a "right . . . to receive" (*id.* at 390), despite the fact that the premise of federal regulation is that "even if the entire radio spectrum is utilized . . . there [is] room for only a few" of those "who hope to communicate by radio" (*id.* at 388). Finally, the Commission's view is completely at odds with this Court's admonitions in *Red Lion* that licensees have "no right to an unconditional monopoly of a scarce resource which the government has denied others the right to use" (*id.* at 391), that there is "no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all" (*id.* at 392), and that the "rights of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others" (*id.* at 387). For, the Commission's inaction here entrenches the monopoly position of licensees by allowing them to "snuff out" the free speech rights of editorial advertisers through the practice of a clearly unconstitutional form of

"censorship" based on "content alone" (*Mosley*, 40 L.W. at 4878).

3. The broadcasters and the Commission join in arguing that the Communications Act does sanction "a total exclus[ion of] controversial public debate from broadcast advertising time" (A. 449) "in the context of the safeguards that the Fairness Doctrine affords the public" (Gov. Br. p. 40).

But § 315 of the Act "obligat[es]" broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." "The 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public." *Red Lion*, 395 U.S. at 385. Section 315, in other words is the statutory expression of Congress's determination that the radio and television media shall be regulated so as to "function consistently with the ends and purposes of the First Amendment" (*id.* at 389). In implementing the commands of that section the Commission is, therefore, mandated to maximize constitutionally protected free speech to the fullest feasible extent.

As already noted (pp. 7-11 *supra*), effectuation of this duty in the area of program time involves the most substantial and sensitive difficulties because it entails choices between competing First Amendment claims. For this reason, or perhaps others, the Fairness Doctrine does not contemplate that licensees will be required to cover any particular issue of public importance, or indeed of the full range of "problems which beset the people" (*Red Lion*, 395 U.S. at 394) to the optimum point. It sets a minimal

standard of broadcast responsibility, leaving to the licensee's "best judgment and good sense" the "subjects that should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." *Report on Editorializing,* 13 FCC 1249, 1251. Thus, this standard has "taken on effective meaning only in the most extreme cases of broadcaster irresponsibility." A. 471, n. 35. Certainly then, the promulgation of the Fairness Doctrine cannot be said to exhaust the Commission's responsibilities under § 315. The fact that a public issue, or a range of public issues, has been "covered" may justify the determination that other matters should be allowed to come to the fore in order to promote variegated broadcast programming. It provides no justification, however, for allowing licensees to subordinate the rights of editorial advertisrs to those of commercial advertisers. For their decision to do so serves no free speech interest. Instead it makes a "desert" out of a potential public interest message "oasis." Cf. A. 465.

It is equally plain that § 153(h) of the Act, providing that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier," does not, as the Government and broadcasters claim, cut against the decision below. As the Government itself recognizes, this provision was added on the ground that common carrier status would require licensees, who initiated "discussion of [a] question affecting the public" to "give *all* their time to that kind of discussion or no public question could be discussed" (Gov. Br. p. 41, quoting 61 Cong. Rec. 12502, 12504). Thus Congress's concern was that a requirement to accommodate all

who wished to speak would so strip broadcasters of their right to make editorial judgments that the interest in diversified programming would suffer. But under the decision below "broadcasters would retain wide ranging control" (A. 483); they would not be required to accept all public interest messages that are submitted, or any particular message (A. 482). Indeed, the instant cases do not deal with program time at all. They deal with advertising time, and nothing in the lower court's decision requires broadcasters to expand advertising time to the detriment of programming. Moreover, in light of this Court's decision in *Red Lion*, it is plainly extravagant to argue, as the Government does, that any rule, no matter how limited and justified, which "enjoin[s] . . . the licensee . . . from exercising journalistic judgment" is contrary to § 153(h). Gov. Br. p. 43. For *Red Lion*, 395 U.S. at 390-395, validated the Commission's "personal attack" and "editorialization" rules, not simply the Fairness Doctrine. And those rules cut more deeply into the journalistic judgments of broadcasters than the limited regulation of advertising time suggested by the court below.

In *Red Lion*, as here, the broadcasters argued that a ruling which effectuated the free speech rights of non-licensees created prohibitive administrative problems. This Court, rejecting that contention, replied that this "possibility is at best speculative," that "in the past" the doctrine in question "has had no such overall effect," and that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications"

(395 U.S. at 393). The "spectres of chaos, grossly imbalanced programming and financial disaster" (A. 486) advanced in the instant cases are no more credible than those found insufficient in *Red Lion*.

The court below charged the Commission with the task of "develop[ing] 'reasonable regulations' . . . requiring that some . . . editorial . . . advertising . . . be accepted" (A. 484). That responsibility is plainly no more onerous than the comparable task—to develop the rules governing expressive activity on the streets and other public places—which this Court has assigned to far less expert agencies in its decisions in *Cox* v. *New Hampshire*, 312 U.S. 569, and its progeny. Indeed, it may well be more manageable since the factors to be evaluated in the broadcasting context are more nearly comparable. Certainly it is less taxing than the highly sensitive regulatory burden the Commission has assumed for itself in developing and explicating the controls on licensee programming decisions in the Fairness Doctrine. And, looking to the past as a guide, the court below noted: "Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted." A. 484. Moreover, the rule laid down by the lower court closely parallels the principles stated by the Commission in *United Broadcasting Co.*, 10 F.C.C. at 417-518. Obviously the Commission believed itself competent to deal with the problem then. There is no reason to believe it is less competent now. For its retreat from *United Broadcasting* in the instant cases is supported by technical arguments of law, and not by concrete examples of practical difficulties experienced under that precedent.

The situation here is thoroughly comparable to that presented in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177. There the NLRB challenged a court of appeals decision on the ground that to "apply the abstractly just doctrine" decreed "would put on the Board details too burdensome for effective administration" (313 U.S. at 198). Justice Frankfurter replied:

> "Simplicity of administration is thus the justification for [the NLRB's position] . . . But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness." *Ibid.*

The contentions that the decision below will lead to "grossly imbalanced programming and financial disaster" (A. 486) rest on an even less substantial foundation. To be sure, since the subject here is paid broadcast time the rule contended for requires that those who wish to initiate the dialogue on matters of public importance during advertising time must be able to pay their way. But the fact that there are some who may not be able to afford to take advantage of this opportunity does not justify the present improper and unconstitutional discrimination against those who can. The argument to the contrary is no better than the proposition that *New York Times*, 376 U.S. 254, should have been decided in favor of Mr. Sullivan because it expanded the rights of those who were able to afford newspaper advertisements but not those who could not. The critical point is that the decision below, like the decision in *New York Times*, vastly increases the opportu-

nity for "uninhibited, robust and wide open . . . debate" (376 U.S. at 270). Moreover, since it is a debate on public issues that the First Amendment seeks to encourage, there is ample room for the Commission to set limits on the amount of time "one group or the representatives of one particular narrow viewpoint" (A. 485) may buy, either in total, or in any given hour or day. The principles of debate also require that both sides be heard. Thus, we believe that it is implicit in the entire scheme of broadcast regulation enunciated by this Court in *Red Lion*, 395 U.S. at 389-392, "that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963)." A. 486. This obligation, of course, blunts the cutting edge of the argument that the decision below unfairly favors the well-to-do.

This does not mean that a rule requiring licensees to accept some editorial advertisement should cost broadcasters a single dollar of lost revenue. The argument here is that broadcaster discrimination against public interest massages in the sale of advertising time should be prohibited; and not that licensees should be required to subsidize this method of speech. Thus, if experience demonstrates that carrying editorial advertisements entails significantly higher costs, because of the *Cullman* doctrine, or for other reasons, and thus generate a lower return, broadcasters should be allowed to reflect this fact in their rate structure. Obviously, neither this suggestion, nor those advanced by the court below (A. 483-488), are the final answer. The ultimate determinations are for the Commission. But one point is

plain. The alternatives which have been offered demonstrate that there is nothing to the view that this problem is beyond rational solution once the Commission sets its best efforts to solving it.

4. The Commission on the one hand, and the broadcasters on the other, advance mutually inconsistent arguments, whose common object is to sweep all the chessmen from the board.

The Commission objects: "The decision of the court of appeals in this case substantially encroaches upon [the Commission's] responsibility. In effect it transfers the making of basic policy judgments from the Commission to the courts." Gov. Br. 26. To begin with, this argument grossly exaggerates the scope of the decision below. Here, as below, the Commission "apparently misunderst[ands] the narrowness of the issue" and the "modest" nature of the "reform" decreed. A. 482. The lower court was scrupulous to respect the right of the Commission to choose as long as it demained within the "range of choices" (Gov. Br. p. 36) open to it under the Act and the Constitution. "[W]e leave the Commission and licensees broad latitude to develop 'reasonable regulations' which will avoid any possibility of chaos and confusion." A. 484. The lower court's decision was no judicial usurpation, but the exercise of the responsibility imposed on the courts by the judicial review provision of the Communications Act, which the DNC and the BEM invoked after the Commission denied them relief. It should go without saying that that responsibility did not abate, nor the lower court's jurisdiction lapse, because the Commission, after deciding these cases on the merits and without any suggestion that complex

practical, rather than purely legal, issues were involved, belatedly instituted a rule making proceeding while they were *sub judici*. See Gov. Br. pp. 5-20. Indeed, the prospect that the Commission may ultimately issue a rule accentuates the need for an authoritative exposition of the governing statutory and constitutional principles. As the Government concedes, "when the Commission formulates regulations for encouraging free discussion over the airwaves, it must act consistently with the First Amendment and . . . whether it has done so depends not only on the objective but also on the means adopted to achieve it." Gov. Br. p. 35. For "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences, which is crucial here . . . may not constitutionally be abridged either by Congress or *by the FCC.*" *Red Lion*, 395 U.S. at 390 (emphasis supplied). The court below did no more, and no less, than to exercise the high judicial function of confining the Commission's discretion within Constitutional bounds.

In light of the Commission's assertion of power to regulate the subject to this lawsuit to the exclusion of the courts, it is rather startling to find the broadcasters arguing that their choices as to who shall speak are beyond all regulation.

This argument is foreclosed by this Court's response to the broadcasters' insistence that the Fairness Doctrine they now embrace, was unconstitutional. For in *Red Lion*, 395 U.S. at 389-392, the Court held that the First Amendment required, and not simply permitted, governmental regulation of programming decisions by licensees. The broadcasters were subject to the First Amendment with respect to programming not simply because they received some benefit

from the Government (cf. *Moose Lodge* v. *Irvis*, ... U.S. ....., 40 L.W. 5127) but because the Government was involved with the very activity alleged to be unconstitutional (cf. *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A. 2, Friendly, J.). That activity, there as here, was the exclusion, by the force of criminal sanctions (§ 301 of the Act), of all persons who do not have broadcast licenses, or who are not permitted to speak by a licensee. This is the source of the licensees' "monopoly of a scarce resource which the Government has denied others the right to use." *Red Lion*, 395 U.S. at 391. The same sanctions which prevented Mr. Cook from replying to the personal attack on him which generated the *Red Lion* litigation (see 395 U.S. at 371-372), foreclose the DNC and the BEM from broadcasting their message of public importance without the consent, voluntary or involuntary, of a licensee. Whatever there may be in this case which is left open after *Red Lion*—and we do not believe it is anything of principle—it is certainly no longer open to the broadcasters to argue that their decisions as to who shall speak in advertising time are outside the First Amendment.

CONCLUSION

For the foregoing reason, the decision of the court below should be affirmed.

Respectfully submitted,

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